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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 784

SUPERIOR TANNING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 529–548) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 41–74) are reported in 14 N. L. R. B. 942.

JURISDICTION

The decree of the court below (R. 571–574) was entered on January 21, 1941 (R. 571). The petition for a writ of certiorari was filed on February 21, 1941. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's decision and order abridged petitioner's freedom of speech in violation of the First Amendment.

2. Whether, upon findings that petitioner's employees had been induced and coerced by petitioner's unfair labor practices to enter into individual employment contracts designed by petitioner to prevent the employees from joining a labor organization and that continued enforcement of the contracts would leave the employees subject to the restraints engendered by the unfair labor practices, the Board could validly order petitioner to cease and desist from giving effect to the contracts "or to any modification, continuation, extension, or renewal thereof or to any similar form of contract" for any period subsequent to December 31, 1938, when the contracts expired.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 41–74). While petitioner does not expressly

challenge the Board's findings of fact, which the court below confirmed (R. 532–543, 547–548), the statement of the facts in the petition for certiorari (pp. 8–12, 30) in important instances departs from the findings and assumes as true evidence which the Board rejected. The pertinent facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

As a result of an organizational campaign undertaken following the decisions of this Court upholding the Act, approximately 100 of petitioner's 270 employees joined the Union prior to May 20, 1937 (R. 45–46; 214–216, 109–110).[2] Petitioner was aware of this fact, its knowledge being gleaned in part by interrogation of employees (R. 57–58; 89–

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[2] The term "Union" is used herein to refer generally to the "outside" labor organization which sought to organize petitioner's employees. Prior to May 1937, when the unfair labor practices began, the Union had terminated its affiliation with the A. F. of L. and had taken steps to obtain a charter from the C. I. O. In October 1937, it was chartered by the C. I. O. as National Leather Workers Association, Local 43, the organization which filed the charges in the present case. Intermediate the Union's withdrawal from the A. F. of L. and the issuance of its C. I. O. charter, the Tannery Workers Organizing Committee and the United Tannery Workers Union, both affiliated with the C. I. O., continued the efforts to organize petitioner's employees (R. 44–45; 1–2, 145–146, 147, 215–216). Petitioner raises no question based upon the various affiliations of the Union.

92, 109–110, 135, 143, 169, 211–212, 216, 219). On the morning of May 20, 1937, petitioner's officials met in the plant conference room with 25 to 30 employees selected by petitioner (R. 46; 162–163, 170, 196). Petitioner's claimed purpose in calling the meeting was to avoid "dissatisfaction" by announcing to the employees some improvements in their working conditions (R. 46; 162, 196–197). As soon as the conference was over Jacobson, petitioner's counsel, drew up forms for individual contracts of employment embodying the proposed improvements and arranged to have the contract forms printed immediately (R. 47; 170–173, 197). The afternoon of the same day petitioner called a meeting of all its employees (R. 47; 76–77, 102, 132, 138, 143, 197, 217). Jacobson addressed the meeting for about an hour; he stated that petitioner and the group which met in the morning "had agreed to an individual contract" and read the printed form which he had drafted (R. 47; 164–165, 231–233). There is also evidence, which the Board accepted, that he disparaged unions, advised the employees not to join one, and threatened them with discharge if they did so (R. 47–50, 60; 78–79, 102–103, 105, 127–128, 135–136, 143–144, 217–218). Czonstke, a foreman, translated the contract into Polish and likewise spoke against "outside" unions (R. 48, 49–50; 87). Jacobson urged the individual contracts upon the men (R. 47–48, 49; 129, 133, 135–136, 218). Following the

meeting supervisory employees and petitioner's vice-president distributed the contracts among the employees and, with the use in some cases of bribes, threats or oaths, urged them to sign, which all but 2 of the 270 employees did (R. 50–53; 80, 89, 97–98, 106–107, 108, 133, 139, 185–186, 192).

The Board found that the meeting of May 20 "evidenced to [petitioner's] employees its preference for dealing with them on an individual basis" and that the employees were coerced by petitioner into signing the individual contracts (R. 49, 52).

Following the execution of the contracts, petitioner negotiated with the individual "representatives" named in the "adjustments" clause of the contracts concerning matters which are normally subjects of collective bargaining (R. 54–55; 181–182).[3]

When the contracts were about to expire in December 1937, petitioner summoned the "repre-

[3] The "adjustments" clause reads as follows: "Adjustments.—The Company will endeavor to adjust with the Employee all complaints and disputes by negotiation, if possible. If it cannot be so adjusted, the Employee hereby selects -------- as his representative and arbitrator, and the Company will select its representatives, and they shall promptly hear and adjust all such complaints, or failing to do so shall select a third arbitrator, which three shall promptly hear, adjust, and arbitrate every such complaint or dispute. The decision of a majority of such Board to be final on both Employee and Employer" (R. 232). Apparently all of the 25 to 28 representatives named in these clauses by the 270 employees were employees of petitioner (R. 174–175, 177).

sentatives" to a meeting, proposed certain changes in the contracts, and had the "representatives" distribute contracts for the year 1938 among the employees for signature (R. 55; 174–175, 176–177).[4] All but one of the employees signed a new contract (R. 55; 176). The Board found that the 1938 contracts "were simply a continuation of the 1937 contracts and were no less an exercise of [petitioner's] economic power over its employes for the purpose of interfering with, restraining, and coercing them in the exercise of the rights guaranteed in Section 7 of the Act" (R. 57).

Upon the foregoing findings and upon further findings, not here in issue, that petitioner discharged Steve Adamczewski in violation of Section 8 (3) and (1) of the Act (R. 66–69), the Board ordered petitioner to cease and desist from the unfair labor practices found; to cease giving effect to the individual contracts "or to any modification, continuation, extension or renewal thereof or to any similar form of contract for any period subsequent to December 31, 1938;" to offer reinstatement with back pay to Adamczewski, deducting any moneys paid him by governmental agencies for work performed on work relief projects and

[4] Solomon Katz, petitioner's secretary-treasurer, testified that he instructed the representatives to "be very careful that the men who sign the contracts do not omit to place in Article 8 the name of their representative for 1938" (R. 176–177).

paying over the amounts deducted to the agencies which disbursed the moneys; to place five other employees on a preferential list for rehiring; to notify in writing each employee who had signed a contract that it had been entered into pursuant to unfair labor practices, was invalid and would not be enforced, and that the employee would not be required to deal with petitioner through the "representative" named in the contract; and to post appropriate notices (R. 72–74).

On August 15, 1940, the Board filed in the court below a petition for enforcement of its order against petitioner. On December 14, 1940, the court handed down its opinion (R. 529–548) enforcing the order as issued by the Board except that the court modified the provision requiring petitioner to notify the employees that the contracts were invalid so as to make that provision conform with the decisions of this Court in *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, and *American Mfg. Co.* v. *National Labor Relations Board,* 309 U. S. 629,[5] and except that the court set aside the "work relief" provision (R. 73,

[5] The court struck from paragraph 2 (d) of the Board's order (R. 74) the requirement that the notice to the signer of each contract state that "it is invalid and void" and added to the notice the following qualification: "but this is without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts" (R. 547, 573).

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545, 572–573) held invalid in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, and the provision requiring petitioner to place five employees on a preferential list for rehiring. A petition for rehearing filed by petitioner was denied on January 15, 1941 (R. 549–570, 571) and a decree in accordance with the court's opinion was entered on January 21, 1941 (R. 571–573).

ARGUMENT

The petition for certiorari seeks review of the decree below only in so far as it enforced paragraph 1 (c) of the Board's order, which requires petitioner to cease and desist from

> Giving effect to the individual contracts of employment in the form noted in the findings of fact above or to any modification, continuation, extension, or renewal thereof or to any similar form of contract for any period subsequent to December 31, 1938 [R. 73, 572; Pet. 14–15].

The other provisions of the order are not challenged, and no direct contention is made that the Board's findings of fact, which were confirmed by the court below, are not supported by substantial evidence. Petitioner's contentions are (1) that paragraph 1 (c) of the order abridges petitioner's freedom of speech in violation of the First Amendment; (2) that the Board had no power to require petitioner to cease and desist from giving effect to the contracts since they were not found to be in-

valid on their face and were not made through a company-dominated union; and (3) that, in any event, paragraph 1 (c) is too broad. None of these contentions has merit.

1. Petitioner's assertion (Pet. 2, 5, 15, 30–37) that its freedom of speech has been infringed and that the decision below is in conflict with *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905 (C. C. A. 6), certiorari denied, February 10, 1941, No. 661, this Term, assumes that the order requiring petitioner to cease and desist from giving effect to the individual employment contracts rests upon findings (R. 47–49) concerning the anti-union speeches made by Jacobson and Czonstke at the meeting of employees called by petitioner on the afternoon of May 20, 1937 (*supra*, p. 4). It is apparent from the Board's decision, however, that its conclusion that the contracts were invalid under the Act does not rest wholly or even chiefly upon these two speeches, but upon petitioner's entire campaign to force the contracts upon the employees as a means of defeating the Union and of avoiding collective bargaining with that or any other "outside" union. The Board regarded the contracts as "integral parts of a carefully formulated program on the part of [petitioner] to discourage its employees from becoming or remaining members of an 'outside' union and to erect a permanent barrier in the path of any future attempts to organize them" (R. 60; see R.

68–69).[6] The Board specifically found that even without the speeches petitioner's course of conduct negatived any contention that the employees freely executed the contracts without interference or coercion by petitioner[7] (R. 49–50).

Moreover, the decision below would not be in conflict with the *Ford* case, even if the Board's order with reference to the individual contracts rested wholly upon the findings concerning the anti-union speeches. In the *Ford* case the court refused to enforce an order of the Board requiring the company to cease and desist from distributing to its employees pamphlets disparaging labor organizations. There is no corresponding provision in the Board's order here. Further, it appears from subsequent decisions of the Sixth Circuit that its decision in the *Ford* case rested upon the court's determination that the literature which the employer distributed was not in fact coercive.[8] In

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[6] The court below termed petitioner's course of conduct "a planned program to discourage unionization of [petitioner's] employees and to eliminate the Union from its plant" (R. 544).

[7] The court below agreed that "even without any evidence relating [to the anti-union speeches], the meetings and the reading of the contracts would have pressed on the minds of the employees the thought that [petitioner] preferred to deal with them on an individual basis" (R. 539).

[8] In the *Ford* opinion the court pointed out that the literature "contain[s] no threat of discharge or discrimination and Mr. Ford makes it plain that no threat of discharge is intended" (114 F. (2d) at 913). In *National Labor Rela-*

the present case the Board referred to evidence that in his speech Jacobson spoke of unions in disparaging fashion, advised the employees not to join one, and threatened them with discharge if they did so (R. 48–49), and found that through both speeches petitioner impressed upon the employees "its determination not to countenance union membership among its employees" (R. 49–50. See also R. 60).

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tions Board v. *P. Lorillard Co.*, decided February 14, 1941 (C. C. A. 6), the court sustained the Board's findings that "by disparaging the [union], and by threatening to move its plant from Middletown if the employees continued their efforts to bargain through the union" the employer violated Section 8 (1) of the Act. The court held: "The facts as to unlawful interference with the union, in violation of § 158 (1), are sustained by the record, and it is unnecessary to review them. Threats of closing the plant, when coupled with intimidation, have been held by this court (*Atlas Underwear Co.* v. *National Labor Relations Board*, decided January 15, 1941) to violate the statute. The finding of the Board that the respondent, through the intimidatory, coercive and derogatory statements of its plant manager concerning the union, has interfered with, restrained and coerced its employees in the exercise of the rights granted in § 157, is sustained by ample evidence." In the *Atlas Underwear* case the court sustained the Board's findings on the ground that threats to close a plant if it becomes unionized "must be regarded as coercive." In *National Labor Relations Board* v. *Dow Chemical Co.*, decided February 6, 1941 (C. C. A. 6), the court confirmed findings by the Board that the employer lent support to one labor organization in opposition to another, *inter alia*, by "threats" and other "coercive statements." See also, *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. (2d) 800, 804 (C. C. A. 6), decided prior to the *Ford* case.

2. The Board found, and its finding is not challenged, that the contracts were entered into as a direct result of petitioner's unfair labor practices and that continued enforcement of the contracts would leave the employees subject to "the restraint and interference involved in and exerted by these illegal contracts" (R. 70). Petitioner asserts, however (Pet. 5–6, 15, 17, 20–23), that since the individual contracts in this case were not made through a company-dominated union and since there is no finding that the terms of the contracts violated the Act, the Board had no power to require petitioner to cease giving effect to the contracts. The court below held that the decision of this Court in *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, supported the power of the Board to require an employer to cease giving effect to individual contracts which "in their history, execution and existence are tainted by employer conduct condemned by the Act" (R. 546–547).

We submit that petitioner's contention raises no question not already settled by the *National Licorice* decision. In that case the individual contracts between the employer and its employees "were found to have been procured in violation of the National Labor Relations Act, and to contain provisions violating that Act * * *" (309 U. S. at 351; see 359–360). It is plain that the Court

deemed either defect in the contracts sufficient to warrant the Board's remedial order. The Court stated that (at p. 361):

> Since the contracts were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board authorized by § 10 of the Act.

And the Board's order was sustained because its effect was only to preclude the employer "from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act" (at p. 365).[9]

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[9] The Court held that *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, was not decisive of the question presented in the *National Licorice* case because in the *Consolidated Edison* case the Court had concluded that "there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective" (309 U. S. at 361). The Board's contention in the *Consolidated Edison* case "that the contracts were the fruit of the unfair labor practices of

In the present case, as in the *National Licorice* case, the contracts resulted directly from the employer's interference with the rights guaranteed employees in the Act and were the instruments whereby such interference was continued. Under such circumstances, the order was well within the Board's power to restore conditions permitting free exercise of the rights of self-organization and collective bargaining. The *National Licorice* case, *supra; International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 82; *National Labor Relations Board* v. *Link-Belt Co.,* Nos. 235, 236, this Term, decided January 6, 1941; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241, 250; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 236.

3. Petitioner contends (Pet. 4, 5, 28–29) that the Board could not order (R. 73) it to cease giving effect to "any modification, continuation, extension, or renewal [of the the contracts found to be invalid] or * * * any similar form of contract for any period subsequent to December 31, 1938," the expiration date of the second group of

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the employers" was disposed of not on the ground that even if true the contention would not support the order in the absence of illegal terms or a company-dominated labor organization through which the contracts were made, but on the ground that if the Board intended to make that assertion it should have been alleged and proved (305 U. S. at 238).

contracts (R. 56). We submit that this provision is a proper effectuation of the "salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *National Labor Relations Board* v. *Express Publishing Co.,* No. 442, this Term, decided March 3, 1941.

The provision does not, as petitioner asserts, deny all "right to make any contract with any of these employees now or at any time" (Pet. 28–29). Read in its context, it forbids only contracts which are subject to the infirmities that rendered continued enforcement of the 1937 and 1938 contracts inconsistent with the Act's guarantees. Any "modification, continuation, extension, or renewal" of those very contracts would plainly continue the effects of the unfair labor practices which brought about the execution of the contracts originally (see R. 57). The challenged provision is "formed and phrased to prevent" evasion of the order (*National Labor Relations Board* v. *Pure Oil Co.,* 103 F. (2d) 497, 498 (C. C. A. 5)); it is a reasonable safeguard designed "to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past." The *Express Publishing* case, *supra.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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MARCH 1941.